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(2) The current status of any pending motions;

(3) A schedule of proceedings that is consistent with the date of the evidentiary hearing set by the Commission;

(4) Steps taken to preserve evidence relevant to the issues raised by the claims and defenses;

(5) The scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan, including the disclosure of electronically stored information;

(6) Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial, and any request to bifurcate issues, claims or defenses; and

(7) Other possible agreements or steps that may aid in the just and expeditious disposition of the proceeding and to avoid unnecessary cost.

(c) *Prehearing scheduling order.* (1) Not later than 2 days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings that will permit the evidentiary hearing to commence on the date set by the Commission, including a plan of discovery that addresses the deposition of fact witnesses, timing of expert discovery, and the production of documents and electronically stored information, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference. The Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint.

(2) The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of

the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) *Additional prehearing conferences and orders.* The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the just and expeditious disposition of the proceeding and to avoid unnecessary cost. Such conferences shall be held in person to the extent practicable.

(g) *Public access and reporting.* Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

[74 FR 1820, Jan. 13, 2009]

§ 3.22 Motions.

(a) *Presentation and disposition.* Motions filed under § 3.26 or § 4.17 shall be directly referred to and ruled on by the

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Commission. Motions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge. Motions not referred to the Administrative Law Judge shall be ruled on by the Commission within 45 days of the filing of the last-filed answer or reply to the motion, if any, unless the Commission determines there is good cause to extend the deadline. If the Commission refers the motion to the Administrative Law Judge, it may set a deadline for the ruling by the Administrative Law Judge, and a party may seek review of the ruling of the Administrative Law Judge in accordance with § 3.23. During the time a proceeding is before an Administrative Law Judge, all other motions shall be addressed to and decided by the Administrative Law Judge, if within his or her authority. The Administrative Law Judge shall certify to the Commission a motion to disqualify filed under § 3.42(g) if the Administrative Law Judge does not disqualify himself or herself within 10 days. The Administrative Law Judge shall certify to the Commission forthwith any other motion upon which he or she has no authority to rule. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed. All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(b) *Proceedings not stayed.* A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.

(c) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words. These word count limitations include headings, footnotes, and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). Documents that fail to comply with these provisions shall not be filed with the Secretary. Motions must also include the name, address, telephone number, fax number, and e-mail address (if any) of counsel and attach a draft order containing the proposed relief. If a party includes in a motion information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file 2 versions of the motion in accordance with the procedures set forth in § 3.45(e). The party shall mark its confidential filings with brackets or similar conspicuous markings to indicate the material for which it is claiming confidential treatment. The time period specified by § 3.22(d) within which an opposing party may file an answer will begin to run upon service on that opposing party of the confidential version of the motion.

(d) *Responses.* Within 10 days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality

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protections pursuant to a protective order, the opposing party shall file 2 versions of the answer in accordance with the procedures set forth in § 3.45(e). The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief. The reply may be conditionally filed with the motion seeking leave to reply. Any reply with respect to a dispositive motion, or any permitted reply to any other motion, shall be filed within 5 days after service of the last answer to that motion.

(e) *Rulings on motions.* Unless otherwise provided by a relevant rule, the Administrative Law Judge shall rule on motions within 14 days after the filing of all motion papers authorized by this section. The Commission, for good cause, may extend the time allowed for a ruling.

(f) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(g) *Statement.* Each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), and each motion for enforcement pursuant to § 3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and

place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

[74 FR 1821, Jan. 13, 2009]

§ 3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.* (1) The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(i) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to § 3.36, if such appeal is based solely on a claim of privilege: *Provided*, that the Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of non-public Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, an individual Commissioner, or the Office of the General Counsel;

(ii) Suspends an attorney from participation in a particular proceeding pursuant to § 3.42(d); or

(iii) Grants or denies an application for intervention pursuant to the provisions of § 3.14.

(2) Appeal from such rulings may be sought by filing with the Commission an application for review within 3 days after notice of the Administrative Law Judge's ruling. An answer may be filed within 3 days after the application for review is filed. The Commission upon its own motion may enter an order staying compliance with a discovery demand authorized by the Administrative Law Judge pursuant to § 3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of memoranda